Supreme Court, U.S.
FILED

011686 APR 29 2002

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No. _____

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in holding, in a non-asbestos case, that a bankruptcy court is empowered to confirm a chapter 11 plan providing for the discharge of a third party's state law liability to a non-consenting creditor?

Parties to the Court of Appeals Proceeding and corporate disclosure statement.

The Sixth Circuit's judgment (App 27a) determined all appeals from the district court's November 13, 2000 decision and judgments (App 38a) affirming in part and reversing in part the bankruptcy court's November 30, 1999 order confirming plan. Appeals from each of the district court's November 13 judgments were given separate case numbers by the Sixth Circuit and were consolidated by that court for purposes of briefing and submission (and argument) only. (App 30a).

The confirmed plan created a Class Five consisting of breast implant claimants. The Class Five Nevada Claimants' appeal before the Sixth Circuit was case 00-2516. The 55 women, comprising the Class Five Nevada breast implant claimants listed in Appendix 336a, were the only appellants in that appeal, and constitute the petitioners herein. Appellants in the other appeals of the district court's November 13 judgments, all partially consolidated with the Nevada Claimants' appeal, some breast implant claims and some not, were Janet S. Lacy, individually and on behalf of her minor child, Andrea Lane Atherton; Jama Nmi Russano, individually and as guardian for Richard Todd Russano; Michael Nmi Russano; Andrea Lane Atherton, Claimant, a minor; Richard Todd Russano, a minor (00-2517); 1,300 Australian Tort Claimants (00-2518); Martha S. Jacobs (00-2520); Helen D. Schroeder 00-2521); Beatrix Shishido (00-2522); Pennsylvania Coordinated Silicone Breast Implant Litigation (00-2523 ; Karen L. Hustead (00-2524); Certain Foreign Claimants (00-2525); Hartford Accident And Indemnity Company; Hartford Fire Insurance Company; Nutmeg Insurance Company; First State Underwriters Agency Of New England Reinsurance Corporation; Twin City Fire

Insurance Company; Excess Insurance Company; First State Insurance Company (01-1001); United States Of America (01-1102); New Zealand Claimants (01-1349).

The Appellees in petitioners' appeal before the Sixth Circuit were Dow Corning Corporation, Debtor; Official Committee Of Tort Claimants; The Dow Chemical Company; Corning, Incorporated; Official Committee Of Physician Creditors; Hartford Accident And Indemnity Company; Hartford Fire Insurance Company; Nutmeg Insurance Company; First State Underwriters Agency Of New England Reinsurance Corporation; Twin City Fire Insurance Company; Excess Insurance Company; First State Insurance Company; Certain Lloyds Of London Underwriters; Certain London Market Insurance Companies. These parties were also the appellees in the partially consolidated appeals taken by non-Nevadans, mentioned above.

None of the petitioners is either publicly held or affiliated with an entity that is. The Debtor is not publicly held. Petitioners do not know whether debtor is affiliated with an entity that is. One or more of the other respondents may be publicly held or affiliated with an entity that is so held. Petitioners understand that the stock of respondents Dow Chemical and Corning, Inc. is publicly traded.

Certiorari to review other issues has been denied twice before in this case.[1]

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[1] *In Re Dow Corning Corporation*, 86 F.3d 482, 36 C.B.C.2d 218 (CA 6. 1996), cert. den. 117 S.Ct. 718 (*Pacor* issue-see p 19 of this Petition). *In re: Dow Corning Corporation*, 113 F.3d 565 (6th Cir., 1997), cert. den. 522 U.S. 977 (abstention issue).

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Petition for a Writ of Certiorari

Petitioners Tiffany Williams, Judy Lieb, Sherann (Christy) Scott and the other 50 Nevada Class Five Nevada breast implant claimants (herein the "Class Five Nevada Claimants," and "Nevadans"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions and Orders Below

The opinion of the United States Court of Appeals for the Sixth Circuit (App 1a) is reported at 280 F.3d 648. The amended opinion of the district court (App 37a) is reported at 255 B.R. 445. The district court's order of dismissal is at App 338a. The district court's order denying reconsideration is at Appendix p. 32a. The bankruptcy court's Order Confirming Plan is at Appendix 318a, and its Findings of Fact and Conclusion of Law at Appendix 309a. The bankruptcy court's Opinion on Best Interests and Whether the Plan Complies with the Applicable Provisions of Title 11 (App 238a), being the last of its confirmation opinions[2], is reported at 244 B.R. 721. Paragraphs 8.1-8.4 of the plan are at App. 327a.

The plan and disclosure statement has, with permission of the court, been lodged, as have the bankruptcy court's other opinions explicating its Order Confirming Plan: the amended classification opinion, containing a general overview of the plan, reported at 244 B.R. 634; the amended opinion on good faith, reported at 244 B.R. 673; the opinion on cramdown of commercial claims, reported at 244 B.R. 678; the Norplant cramdown opinion, reported at 244 B.R. 696; the opinion on cramdown of government claims, reported at 244 B.R. 705, and the opinion on the taxing authorities'

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[2] The bankruptcy court's confirmation opinions are set forth sequentially in volume 244 B.R, beginning at p 634 and ending at p 754.

objections, reported at 244 B.R. 718.

Jurisdiction

The United States Court of Appeal's judgment was filed January 29, 2002. (App 1a).

There is cause for this court to deviate from its normal practice and allow this petition under Rule 11, should it be pre-mature under Rule 13. The judgment, among other things, remanded the case to the district court for additional findings on the third party discharge issue. (App 27a). This remand itself was outside the court's jurisdiction [the remand calls on the trial court to exercise powers it doesn't have]. Further, the requested additional findings are unnecessary to the determination of this case or this petition, and merely force the 175,000 breast implant claimants in this case to continue indefinitely a wait that, when combined with their 3 year pre-bankruptcy wait in MDL-926 (App 45a), is now approaching 10 years. During this wait, their claims against the third parties, which bear no interest, have been stayed. Some petitioners have died, as have witnesses in their underlying cases. Immediate review is warranted.

Petitioners, in their partially consolidated case 00-2516, did not file for rehearing. Mandate issued on 2/20/02 in the petitioners' and all other non-governmental appeals. (App 28a).[3] If this petition is not pre-mature under Rule 13, review is requested under that rule.

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[3] When this petition was originally filed, petitioners were concerned that the Government's then pending petition for rehearing en banc in partially consolidated case 01-1102 may have rendered it premature. However, the government's petition was denied on May 3, 2002.

This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1)

Constitutional and Statutory Provisions Involved

"The Congress shall have Power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, §8, clause. 4.

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a).

"Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

"(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

. . .

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury,

> wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;
>
> . . .
>
> (4)(A)
>
> . . .
>
> (ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction . . ." 11 U.S.C. § 524(g).

"Subject to subsection (a) of this section, a plan may–

. . . (6) include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b).

"The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a).[4]

"(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan–

> (A) discharges the debtor from any debt that arose before the date of such confirmation . . ." 11 U.S.C. § 1141(d)

Statement of the Case

This is a case about abuse of the federal bankruptcy power . . . abuse not by the Article I bankruptcy judge, who

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[4] "Code" means Title 11, U.S.C. All reference to statutory provisions are to 11 U.S.C. unless otherwise noted.

held that the plan confirmation provisions of the Code did not empower him to abrogate state laws enabling non-consenting breast implant claimants to seek damages from third parties, but rather abuse by the Article III courts who reversed.

About half the circuits that have considered the matter allow bankruptcy courts to discharge third parties as part of the plan confirmation process, about half do not. In their attempts to do equity, those circuits which hold that bankruptcy courts have power to permanently enjoin third party actions are doing just the opposite. This case is a good example. Though a chapter 11 plan should normally be confirmed within 6 months of the petition date (11 U.S.C.§ 1121(c)), when a confirmation court must consider whether "unusual circumstances"[5] justify a third party discharge, it is all but impossible to meet the 6 month deadline. This case was filed May 15, 1995. In January of 2002, the Sixth Circuit remanded the case to the bankruptcy court for additional findings regarding those "unusual circumstances."

The facts governing this petition are undisputed[6]. For nearly thirty years, Debtor was this country's predominant producer of silicone gel breast implants. In addition, Debtor supplied silicone raw materials to other manufacturers of silicone gel breast implants.

In 1992, the Food and Drug Administration, citing serious health concerns, ordered that silicone gel implants be

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[5] Even though the trial court eventually found the evidence irrelevant, it nonetheless took much evidence on the third party discharge issue.

[6] For purposes of the petition, the facts as stated by the Sixth Circuit (App 4a) are accepted and largely here repeated. When other facts are added, reference to the appropriate portion of the Appendix is made.

taken off the market, and debtor ceased manufacturing its silicone implants. Tens of thousands of implant recipients sued debtor and, on independent claims, the Dow Chemical Company, claiming to have been injured by auto-immune reactions to the silicone in their implants.

The subsequent consolidated litigation of these claims in 1992 led to a proposed $4.2 billion global settlement, which the multidistrict litigation court approved in 1994. See *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, 1994 U.S. Dist LEXIS 12521, No. CV 92- P-10000-S, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at 1 (N.D. Ala. Sept. 1, 1994).See also *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992). The settlement collapsed in 1995, whereupon debtor filed a petition under chapter 11 of the Bankruptcy Code. Out of the 175,679 domestic and foreign Class Five Claimants eligible to vote on the plan, 122,774 actually voted, and of those who voted, 107,660 voted in favor of confirmation. (App 139a and App 340a). Each of the Nevadans herein voted against the plan. (App 276a). The Nevada Supreme Court has determined that Nevada breast implant creditors have separate and independent claims against both the debtor and Dow Chemical, and that their claims against Dow Chemical are not derivative. (App 398a) *(Dow Chemical v. Mahlum*, 970 P.2d 98 (1998), reh den. 973 P.2d 842 (1999)). Most of the breast implant creditors voting to confirm the plan are residents of states whose laws give them no rights against Dow Chemical[7]. (See also App 342a).

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[7] Though debtor's culpability is well established (See *Hopkins v. Dow Corning Corp.*, 33 F. 3d 1116 (9th Cir. 1994) cert. denied, 513 U.S. 1082 (1995)), the bankruptcy court made no finding as to how many of the claimants had rights under the laws of their states against Dow Chemical or Corning Inc. Some courts allow such suits against Dow Chemical (*In*

Plan proponents' "parade of horribles" argument, their fear that "thousands" of suits against Dow Chemical would be brought if the bankruptcy court's order of confirmation is affirmed (App 105a) (if there is no third party discharge as to non-consenting claimants), is completely unfounded. Even without confirmation it is safe to say that, whatever the number, it is significantly smaller than the number of breast implant creditors with rights against both Dow Chemical and debtor. And with the confirmation, less than 6% of the voting claimants in this bankruptcy now have rights against Dow Chemical, even without the third party discharge. And only a minuscule portion of that 6%, 55 Nevadans and a few hundred others, are probably all that would proceed against Dow Chemical. The balloting results show that over 94% of those voting, being presumably all creditors with substantial claims, voted in favor of the plan. (App 340a). The bankruptcy court "completely credited" Fred Dunbar's estimate that fewer than 7,514 of the claimants would not accept the terms of the settlement offered under the plan. (App 97a). Dow Chemical should not be heard to disagree with the proponents' witness now.

The trustee in bankruptcy appointed several committees to represent the differing interests of debtor's claimants during the development of debtor's plan of reorganization. Primarily because of the third party release provisions, the Tort Claimants' Committee vigorously

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re Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1455 (N.D. Ala. 1995) (holding that the foreseeability of harm to third persons alone may be sufficient to create a duty to the third persons), *Mahlum*, supra. Some of the larger states don't. *(See In re New York State Silicone Breast Implant Litig.*, 642 N.Y.S.2d 681 (App. Div. 1996), *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 957 P.2d 1313,1318 (Cal. 1998)

opposed debtor's first two proposed reorganization plans[8]. Debtor then entered into mediation with the committees, and on February 4, 1999, debtor and the Tort Claimants' Committee together submitted an Amended Joint Plan of Reorganization, containing a third party release, to the bankruptcy court. On November 30, the bankruptcy court confirmed the plan. (App 238a). Under the plan, a $2.35 billion fund is established for the payment of claims asserted by (1) personal injury claimants, (2) government health care payers, and (3) other creditors asserting claims related to silicone-implant products liability claims. The Sixth Circuit found that the $2.35 billion fund is established with funds contributed by debtor's products liability insurers, debtor's shareholders and debtor's operating cash reserves and, that as a quid pro quo for making proceeds available for the $2.35 billion fund, section 8.3 of the plan releases debtor's insurers and shareholders from all further liability on claims arising out of settled personal injury claims, and section 8.4 permanently enjoins any party holding a claim released against debtor from bringing an action related to that claim against debtor's insurers or shareholders. (App 7a), Plan §§ 8.3, 8.4.

Claimants who choose to settle are channeled to the Settlement Facility, a legal entity created by the plan and authorized to negotiate payments out of funds set aside for that purpose. Claimants who choose to litigate are channeled to the Litigation Facility, a legal entity created by the plan that is essentially substituted for debtor as a defendant in the claimant's lawsuit.

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[8] The Nevadans were not invited to these negotiations and did not participate in them.

The plan divides claims and interests into thirty-three classes and subclasses. The plan provides for payment of allowed breast implant claims by the debtor over a period of approximately 10 years, revenues permitting. It is subject to a $2.35 billion dollar overall cap with up to $400,000,000 of that (and no more) being set aside for claimants who do not accept the plan's settlement provisions. (App 247a) Any portion of the $2.35 billion not used to pay claims is returned to the debtor. The plan states that debtor's shareholders, including Dow Chemical, are making a contribution to the plan, which the bankruptcy court called "important." (App 315a). The bankruptcy court did not find that the third party discharge provisions were essential to reorganization, but did find them "essential to reorganization pursuant to this plan" (App 315a) (emphasis added).

The bankruptcy court determined that any authority it might have under the Bankruptcy Code to enjoin a non-consenting creditor's claims against third parties could only be exercised where not inconsistent with non-bankruptcy law. As a permanent injunction barring the Nevadans and those with similar third party claims was inconsistent with state law, and as he also thought a "release" could not be forced on creditors who did not consent to the plan, the bankruptcy judge found such injunctions inappropriate as applied to non-consenting creditors. (App 284a). He construed the plan accordingly. (App 286a).

The district court affirmed the bankruptcy court's Confirmation Order but, concluding that it did have authority and, since lack of authority was the reason for its restrictive construction of the third party discharge, reversed the bankruptcy court's interpretation of the release and injunction provisions of the plan. While not expressly disagreeing with the contract interpretation reasoning of the bankruptcy court, the district court held that the third party injunction/release

provisions discharge all liability the shareholders may have to breast implant creditors, consenting and non-consenting.

The Sixth Circuit affirmed the Confirmation Order and agreed with the district court that bankruptcy courts have power to permanently enjoin suits by unpaid creditors against solvent third parties in unusual circumstances. However, the Sixth Circuit held that the findings made by the bankruptcy court were insufficient and therefore remanded the case for further proceedings. (App. 24a).

The bankruptcy court had jurisdiction by reason of the case having been referred to it by the district court, as permitted by 28 U.S.C. § 157(a) (See E.D. Mich. LR 83.50). The district court had jurisdiction of the case and confirmation of the plan pursuant to 28 U.S.C. § 1334(a), and of appeals from the bankruptcy court under 28 U.S.C. § 158(a). The court of appeals had jurisdiction of the district court appeal under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291.

Reasons for Granting the Writ

The propriety of third party discharge[9] provisions in

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[9] The term "third party discharge" as used herein generally include "non-debtor" discharges and any injunction which permanently enjoins a creditor from seeking payment of his or her claim from a third party or non-debtor. It includes "release" as defined in ¶ 8.3 of the plan, and "non-debtor release" to the extent that such releases are forced upon creditors in a plan which they have not accepted. It also includes "Permanent Injunction Against Prosecution of Released Claims" as used in ¶8.4 of the plan. On the other hand, a "third party release" is used to denote a release or an injunction deemed accepted by voting for the plan. "Permanent Third Party Injunction" is still used in this Petition to describe injunctions issued as part of the plan confirmation process which stop short of discharging the released party's debt, such as the injunction issued in *In re Pws Holding Corporation*, 228 F.3d 224 (3rd Cir., 2000), which

chapter 11 bankruptcy plans is subject to fundamental and long standing differences in the circuits, based on differences in the way they view the powers of a bankruptcy court. In light of the constitutional requirement that the nation's bankruptcy law be uniform, *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457 (1982), the conflict approaches constitutional dimensions.

Since this court's decision in *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295 (1999), prohibiting solvent third parties from discharging their liability to members of a mandatory Rule 23 class by creating a false, non-market tested "limited fund," and forcing class members to resort thereto, similarly situated third parties have turned to bankruptcy courts and particularly chapter 11 in an end run attempt to do the same thing. Yet third party discharges in chapter 11 cases are subject to each and every problem that convinced this court to prohibit the third party discharge charade in *Ortiz*.

The Writ should also be granted because the Sixth Circuit's decision on this issue conflicts with this court's opinion in *Callaway v. Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949) and *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), discussed below.

Finally, the Sixth Circuit's decision clothes a bankruptcy court, otherwise completely without power to do so, with power to enter orders effectively reversing the Nevada Supreme court's *Mahlum* precedent, that Dow Chemical is directly liable to the Nevadans, on a negligent undertaking theory, under Nevada law for personal injuries they suffered by reason of debtor's defective breast implants.

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limited the liability of committee and estate professionals to liability for willful misconduct and gross negligence but did not discharge them.

(App 343a). As such it is a massive intrusion into matters traditionally left for determination by the states.

This petition basically argues that for Dow Chemical to get a discharge, it had to file its own petition in bankruptcy, and that since it did not do so, the Sixth Circuit must be reversed. For a corporation, its officers, directors and shareholders to obtain a bankruptcy discharge in the Ninth, Tenth or Fifth circuits, the corporation and each officer, director or shareholder who wants a discharge must file his own individual bankruptcy. However the same corporation, by filing its chapter 11 petition in the Second, Fourth and now Sixth circuits may obtain a discharge of significant debt in favor of not only the corporation, but also its officers, directors and others, without the officers etc. ever having to file bankruptcy.

The theory behind chapter 11 is that it is in the national interest to keep a corporation going under certain circumstances, that the whole is worth more than the sum of its parts.

> The purpose of Chapter 11 reorganization "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595 (1975), reprinted in 1978 U.S.C.C.A.N. 6179.

In re Cedar Shore Resort, Inc. 235 F.3d 375, 379 (8th Cir. 2000)

Yet in the Fourth and other third party discharge friendly circuits, this purpose is thwarted. The debtor's incentive is not to protect itself and its employees and creditors, but rather to protect its officers, directors, shareholders and other friendly entities, none of which Congress intended to protect by way

of chapter 11. Were the recent Enron (01-16034 (AJG)), Global Crossing (02- 40212 et. seq.) and other major international company bankruptcy filings brought in the Second Circuit to protect the creditors or to protect the officers? We don't know: "A debtor's choice of forum is entitled to great weight if venue is proper." *In re Enron*, 274 B.R. 327, 342 (2002). The Second Circuit permits third party discharges. *Drexel Burnham Lambert Group, Inc.* 960 F.2d 285 (2nd Cir. 1992). Enron's home circuit, the Fifth, does not. *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir.(Tex.) 1995). But we do know that both filed in a third party discharge friendly circuits (Southern District of New York) when at least Enron and perhaps Global Crossing should probably have filed elsewhere. And we also know, from experience in the instant case, that if companies such as these file a plan containing provisions discharging their officers from liability for their own direct wrongdoing, most of the confirmation hearing and, as below, millions of dollars in attorney fees and years of delay, will be devoted to the third party discharge matter, a matter which the Code nowhere authorizes the court to consider in the first place.

> All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent, on the part of the insolvent debtor conduct detrimental to the interests of creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and secondly, from their debtor. A third objective, the protection of the honest debtor from his creditors, by means of the discharge, is sought

> to be attained in some systems of bankruptcy, but this is by no means a fundamental feature of the law.

Levinthal, *The Early History of Bankruptcy Law,* 66 U. of Pa. L. Rev. 223, 224-225 (1918).

> Despite the demonstrated capacity for growth and adaptation which is inherent in the bankruptcy power, and the resulting difficulty of definition, it is clear that there are some things the bankruptcy court cannot do because they have nothing to do with bankruptcy. For example, [to use an archaic and somewhat sexist analogy] though the chief liability of the bankrupt is thought to be his wife, the bankruptcy court cannot strike at the root of his financial troubles by granting him a divorce -- and it is unlikely that Congress, under the bankruptcy power, could authorize the court to do so. Thus the bankruptcy power is restricted not only by other provisions in the Constitution, such as the Due Process Clause, but also by the limitations inherent in the nature of bankruptcy itself. [matter in brackets added]

Hill, *The Erie Doctrine in Bankruptcy*, 66 Harvard Law Review, 1013, 1038 (1953).

Nobody, no reasonable creditor, not least the Nevadans, will easily accept a judicially created rule which takes their state law claim against a very solvent third party and forces them to maintain it, or a version of it, against a bankrupt in a distant bankruptcy court. No reasonable solvent third party, with a chance to discharge substantial claims against it merely by helping a bankrupt in its efforts to pay those claims, will refuse that opportunity, particularly where,

as below, the third party is discharged whether or not the bankrupt ever gets around to actually paying the debt.

In the instant case, it is absolutely certain from the record below that Dow Chemical and Corning Inc., owners of 100% of debtor's stock, will not voluntarily allow their child to emerge from bankruptcy without their third party discharge. The whole case then becomes governed by considerations completely foreign to the Congressional goals behind the enactment of chapter 11 in the first place.

A company's decision to attempt a reorganization under chapter 11, rather than liquidate under chapter 7, is, like venue, also impacted by the third party discharge issue, for it is the very people to be discharged who make the decision to liquidate or reorganize. The decision prompting some of the major recent filings, by typically "dot.com type" companies, companies which have often paid handsome profits to their officers and shareholders without ever turning a profit, to file under chapter 11 rather than 7, may well be primarily motivated by the purpose of protecting those officers. The Code's provisions protecting a shareholder's equity in a solvent debtor (See e.g. §1129(a)(7)(A)(ii)) are as personal as it should get. The Code defines shareholders in a chapter 11 as a class (§ 1123(a)(1), albeit the most junior class (§ 726(a)(6) and § 1129(a)(7)). The Code does not provide shareholders with a right to the additional protection of a third party discharge.

I. Sixth Circuit is in conflict with the decisions of other United States Court of Appeals[10]

A. Circuits holding that §524(e) prohibits third party discharge

Several circuits hold that a bankruptcy court has no authority to confirm a plan containing provisions that discharge a third party. *In re Lowenschuss* 67 F.3d 1394, (9th Cir. 1995); cert.den. *Lowenschuss v Resorts Intern., Inc.* 517 U.S. 1243 (1996)); *Landsing Diversified Properties--II v. First Nat'l Bank & Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990); *In re Zale Corporation,* 62 F.3d 746, 761 (5th Cir. 1995). They interpret §524(e) and its predecessors as prohibiting such plans, reasoning that a discharge and a permanent injunction barring creditors from collecting their debts from a third party are, as to the debts involved, one and the same.

> A discharge in a case under this title-
> ...
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...

See §524(a)(2). The debt remains. It just cannot be collected from the debtor. [*Johnson v. Home State Bank*, 501 U.S. 78, 84, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991) (holding "...a bankruptcy discharge extinguishes only one mode of enforcing a claim -- namely, an action against the debtor in personam.")] This is consistent with §524(e), which also

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[10] A thorough description of the conflict within the circuits is contained in *In Re: Continental Airlines*, 203 F.3d 203, 212-214, (3rd Cir. 2000).

makes clear that the debt remains after discharge.

§ 524(e) got its start in this country as section 34 of the Bankruptcy Act of 1800. Justice Marshall quotes from it in *Tucker v Oxley*, 9 U.S. 34 (1804), noting that it provided that the bankrupt shall be discharged from all provable debts owed at the time he became a bankrupt:

> Provided that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid.

The sense of this old statute was carried forward in § 16 and § 22(b) of the Bankruptcy Act of 1898. Section 16 stated that "the liability of a person who is a co-debtor with, or a guarantor of or in any matter a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Section 22(b) provided that a corporation's discharge in bankruptcy "shall not release its officers, the members of its board of directors or trustees or other similar controlling bodies . . . from any liability under the laws of a State or of the United States." As a result of the mandatory language contained in those sections, courts operating under the Bankruptcy Act held that a bankruptcy court had no power to discharge the liabilities of any of the enumerated parties set forth in § 16 or § 22(b). See *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982); *R.I.D.C. Indus. Dev. Fund v. Snyder*, 539 F.2d 487, 494 (5th Cir. 1976).

This view, that discharge is a reward achievable only by a debtor, was carried forward in 1978 by §524(e) and more recently received additional support from Congress

when it enacted, §524(g), as part of the Bankruptcy Reform Act of 1994, permitting third party discharges in asbestos cases under tightly controlled circumstances, one being that the creditors own most of the company on confirmation. § 524(g)(2)(B)(i)(II) The enabling legislation (Section 111(b) of Pub.L. 103-394) provides:"Nothing in subsection (a), or in the amendments made by subsection (a) [enacting subsecs (g) and (h) of this section] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Still, this new legislation if nothing else clearly shows that Congress considers §524(e) the controlling statute preventing third party discharges, to wit, this new subsection of § 524 provides that third party discharge injunctions are permissible in asbestos cases "Notwithstanding the provisions of §524(e)." See §524(g)(4)(A)(ii).[11]

Those circuits who view the matter controlled by §524(e) are adamant in their view: "This court has repeatedly held, without exception, that §524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *In re Lowenschuss* 67 F.3d 1394, 1401 (9th Cir. 1995); cert. den. *Lowenschuss v Resorts Intern., Inc.* 517 U.S. 1243 (1996))

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[11] It is also noted that during the plan confirmation hearing below Bankruptcy Rule 7001 provided that any proceeding to obtain an injunction was an adversary proceeding. However, Rule 7001 was amended, effective November 1, 1999 (the day after the plan below was confirmed), presumably to accommodate §524(g) to provide that an adversary proceeding is "(7) a proceeding to obtain an injunction or other equitable relief, *except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief.*"

B. Circuits finding power even where inconsistent with non-bankruptcy law

The difference in the other circuits is stark. The Sixth Circuit below joined the Fourth in holding that a bankruptcy court has the power to issue a third party discharge as part of the plan confirmation process. In so doing, it acknowledged the conflict and expressly disagreed with the views expressed by the Ninth and Tenth Circuits:

> Nevertheless, some courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor. See In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1990).

(App 12a)

The expansive view of a bankruptcy court's equitable powers adopted below by the Sixth Circuit was earlier approved in the following circuits: *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2nd Cir. 1988), cert. denied, 488 U.S. 868, 57 U.S.L.W. 3235, 102 L. Ed. 2d 145, 109 S. Ct. 176 (1988). *In re A. H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989), *cert den* 493 U.S. 959; and *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2nd Cir. 1992)[12].

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[12] Judge Martin, writing for the Sixth Circuit, also stated that the third circuit's *Continental Airlines* case (*Gillman v Continental Airlines*, 203 F.3d. 203 (3rd. Cir. 2000) approved such an expansive view of a bankruptcy court's power. However, it is submitted that the courts in *Continental Airlines* and *In re AOV Indus., Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1154 (D.C. Cir. 1986) have yet to finally determine the matter and may well adopt a third approach, similar to that adopted by the bankruptcy court below. "Establishing a rule would provide guidance

These courts find the bankruptcy court's power to issue third party discharges in its general equitable powers, and particularly rely upon §105(a) and 1123(b)(6) of the Code to reach their conclusion that Congress intended the reorganization policies set forth in Title 11 to reign supreme over all other state and federal non-bankruptcy law, that a bankruptcy judge in confirming a plan may unilaterally override any such non-bankruptcy law which might stand in the way of a reorganization if unusual circumstances exist. See *Bankruptcy Injunctions And Complex Litigation: A Critical Reappraisal Of Non-debtor Releases In Chapter 11 Reorganizations*, Brubaker, 1997 U.Ill.L.Rev. 959, 1010, questioning whether this squared "with the inherent limitations of the judicial process and Congress' primary role in making such policy determinations in the bankruptcy context."

These circuits generally find that a bankruptcy court cannot override non-bankruptcy law unless it first finds "unusual circumstances." The Sixth Circuit below noted that this judicially created power was subject to the bankruptcy court finding certain "factors," also judicially created, apparently by a preponderance of the evidence:

> In determining whether there are "unusual circumstances," our sister circuits have considered a number of factors, which are summarized in our holding below. We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor:
> (1) There is an identity of interests between the debtor and the third party, usually an

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prospectively, but would be ill-advised when we can rule on Plaintiffs' appeal without doing so." *Continental Airlines*, p 214.

> indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Appendix 14a.

Some of these factors are normally thought of as justifying a bankruptcy court's temporary status quo injunction, rather than a permanent third party discharge. For example, both the first ("deplete the assets of the estate") and the third, (need for "debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor") of the Sixth Circuit's factors are nationally accepted *Pacor* justifications for a temporary injunction, which drop out when the case has been administered and is ready for confirmation. *Pacor, Inc. v. Higgins,* 743 F.2d 984 (3rd Cir. 1984). (See also Anti-Injunction Act, 28 U.S.C. § 2283). Not only should they not justify a permanent injunction in any event, they are completely unnecessary at plan confirmation because §1141(d) of the Code provides the debtor with a

discharge on confirmation.

Breast implant, contribution/indemnity, and all other claims are discharged on confirmation, being the whole purpose of confirmation. Whether the amount or the date of payment is unknown is of no moment, for contingent liabilities are still claims (See §101(5)) and all claims are discharged on confirmation. It goes without saying that a discharged claim cannot deplete the estate of the debtor.

The fact that the breast implant claims in this case are contingent did not prevent debtor from discharging them at confirmation and the fact that the indemnity/contribution claims may likewise be contingent does not prevent them from being discharged on confirmation.

Claims of indemnity and contribution were not discharged in this case on confirmation for one reason: Debtor chose not to discharge them. Debtor chose to allow them to survive confirmation because it otherwise would not be able to argue that by reason of contribution/indemnity claims, suits against Dow Chemical would deplete the debtor's estate. §1141(d) gives a debtor the ability to waive discharge of a claim, including contribution/indemnity claims, just as §524(c) gives the chapter 7 debtor the right to waive discharge and reaffirm consumer debts. The Sixth Circuit's factors one and three, supra, in effect require a debtor to waive discharge of claims for contribution and indemnity in order to obtain a discharge of its officers, directors and shareholders. Surely to allow a debtor to bootstrap a discharge of its shareholders only where it chooses to ignore the protections afforded it by §1141 of the code is folly. Such could not have been the intent of Congress. Here, where the shareholder Dow Chemical is a 50% shareholder, the temptation for shenanigans is great, similar to the situation in *Ortiz*.

C. Circuits finding power only where consistent with non-bankruptcy law

There is a third view of this matter in the circuits. The bankruptcy court (App (261a-286a)) followed the lead of *In re Specialty Equipment Co.*, 3 F.3d 1043, 1049 (7th Cir. 1993) and to a lesser extent *In re Continental Airlines*, 203 F.3d 203, 211 (3rd Cir. 2000), courts which disagree with the Ninth Circuit on the effect of §524(e) and disagree with the Second circuit on the power of bankruptcy courts. These circuits find power if the third party discharge is consistent with non-bankruptcy law. This view is consistent with this court's holding in *Callaway v. Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949), and is therefore further discussed in part II, below.

Due process considerations support this approach. It matters not for many bankruptcy purposes whether the debt to be discharged is or is not liquidated. From the debtor's standpoint, there is normally no need to liquidate a debt to be discharged, as the debtor is not responsible to pay it in any event[13]. Likewise, the creditor rarely cares whether the claim is liquidated or unliquidated unless the estate has assets. Thus, the order confirming plan below, discharging thousands of claims against the debtor without the court having first determined the merits of those claims, raises no due process considerations, it being entered pursuant to §1129 of the Code, insuring, basically, that the discharge is in the best interests of the creditors affected.

Whatever the fairness and constitutionality of this to creditors of the debtor, it is patently unfair and

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[13] This was true in *In re Robins*, but is not true in the instant case as the plan provides that all monies not utilized to pay Class Five claimants will revert to the revested debtor.

unconstitutional to give such a discharge to a non-debtor third party. When a discharge is granted a non-debtor, whose assets are not subject to the administration by the bankruptcy court, whose assets are not even known to the bankruptcy court, the concepts involved in deciding thousands of claims against creditors and in favor of the third party, without first hearing those claims and determining their merit, raises serious and obvious due process concerns and smacks of totalitarianism.

The Tort Claimants Committee in this case was appointed to represent the members of the class in its dealings with the debtor. It was not appointed to represent creditors with rights against third parties. A compromise of litigation cannot be imposed upon a party without that party's consent. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 529 (1986). Here, where the settlement was essentially an agreed limited fund, there is a constitutional right to opt out. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). See also *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 124-25 (1994) (O'Connor, J., dissenting) (suggesting that Due Process requires opt-out rights even in a limited-fund class action). The Sixth Circuit denied the Nevadans this right.

The Sixth Circuit's holding that a bankruptcy judge has power to discharge third party nondebtors violates the Bankruptcy Clause of the U.S. Constitution. Only Congress has authority to provide for a distribution/discharge scheme. (Art. 1, ¶ 8, cl. 4). Congress's bankruptcy power

> [e]xtends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation

> affecting substance and form but tending to further the great end of the subject--distribution and discharge--are in the competency and discretion of Congress.

Hanover National Bank v. Moyses, 186 U.S. 181, 186 (1902).

This court has indicated that a creditor's claim against a debtor can be discharged only if the creditor is permitted to share in the debtor's assets on an equitable basis, with Congress defining the contours of the equitable distribution scheme through duly enacted bankruptcy legislation. See *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 450-56 (1937). The court-manufactured discharge of debts approved by the Sixth Circuit violates the separation of powers principles embodied in the Bankruptcy Clause. The creditor subject to the non-debtor discharge has no recourse to an equitable distribution of the assets of the third party. See *Another Way Of Thinking About Section 105(a) And Other Sources Of Supplemental Law Under The Bankruptcy Code,* Nickles & Epstein, 3 Chap. L. Rev. 7, (2000) (§ 105 is not source of legislative authority and if so is unconstitutional).

II. The Decision Below conflicts with this court's decision in *Callaway v Benton*.

Globalization, the process of eliminating differences in laws that hinder commercial advancement, is the buzz word of our time and one of the fundamental issues now facing mankind: Whether it is better to have 50 states, each with its own laws governing its own residents, or to have one national or even international law governing all conduct. Whether Dow Chemical should be liable under a negligent undertaking theory to Nevada women, but not to California or New York women is a question of federalism. Can Congress, following *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) delegate to an article I judge such

massive power, power to reverse the decisions of the highest courts of the 50 states? Plan confirmation is a core proceeding. See 28 U.S.C. 157(b)(2)(L). These issues were on the horizon in 1949 when *Callaway v Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949) was decided.

If a creditor having two assets files a claim attempting to collect one of them from a debtor, neither the debtor nor his trustee acquires rights in the creditor's other asset. § 541(a), defining property of the estate. It was the same under the Act. *In the Matter of Land Investors, Inc.*, 544 F.2d 925, 930 (7th Cir. 1976) (Citing to page 882 of *Callaway v Benton*.)

It is clear that 1) the debtor did not succeed to any rights of the creditors against non-debtor Dow Chemical (*Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972)) and 2) in any event the bankruptcy court did not adjudicate the claims of breast implant creditors against either the debtor or the shareholders.

In *Callaway,* the question was whether state law requiring 100% shareholder approval of a sale prevailed over terms of a confirmed plan permitting the sale on majority vote. The court held:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, . ." (p 141)

The court also held that the internal management of South Western was not within the bankruptcy court's control (p 144) just as, in the instant case, who the Nevadans choose to sue is not within the bankruptcy court's control. The fact that South Western was a creditor gave the bankruptcy court no control over its internal organization (p 146).

> The bankruptcy power unquestionably gives the Commission and court, working within the

> framework of the Act, full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that may be asserted against it. These rights may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company, subject to the requirements of the Act. The purchase of formerly leased properties does not involve rights asserted against the debtor, however. This Court has said that "The exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed." Meyer v. Fleming, 327 U.S. 161, 164 (1946). We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers not justified by any provisions of the Bankruptcy Act.
>
> 336 U.S. 147

It is noted that the statutory powers of a bankruptcy court have not changed since *Callaway*, § 2a(15) of the Bankruptcy Act of 1898 being for all intents and purposes the same as § 105(a) and Section 77 (e), giving the reorganization court the sole authority to determine whether the acceptances of the plan have been made or procured "by any means forbidden by law," is at least as enabling as 1123(b)(6).

The Sixth Circuit below did not discuss the differences in the justifications for a temporary versus a permanent injunction, but to some extent merged the two concepts in its seven factors. This is understandable, if not justifiable, because a temporary injunction is to preserve a court's

jurisdiction or to preserve the status quo and there is some question as to what jurisdiction is being preserved and even what is the status quo in chapter 11 reorganizations. *Callaway* did not dwell on these concepts as the plan there had been confirmed. A temporary injunction to preserve the estate until a plan could be confirmed was therefore unnecessary. This is true here too. The plan is confirmed. The bankruptcy court, the district court and the Sixth Circuit have all said so.

> The Bankruptcy Code does not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here. [Fn 6 - See 11 U.S.C. S 524(g) (establishing procedure for resolving asbestos claims)] Section 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code. However, section 105(a) has a limited scope. It does not "create substantive rights that would otherwise be unavailable under the Bankruptcy Code." United States v. Pepperman, 976 F.2d 123, 131 (3d Cir.1992). Accord Internal Revenue Service v. Kaplan, 104 F.3d 589, 597 (3d Cir.1997). See generally Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code").

In re Continental Airlines, 203 F.3d 203, 211 (3rd Cir. 2000).

III. The *Decision Below Mistakenly Expanded* the Reach of This Court's Decision in *Energy Resources.*

In *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), the bankruptcy court had issued an order under § 105(a) directing the IRS to abide by provisions in a plan requiring it to apply tax payments first to taxes for which corporate officers were also liable. As here, the creditor had the right to payment from two sources, the debtor and a third party (corporate officer). The debtor owed more tax than the officers owed and provided in the plan that the "trust fund" portion of the tax would be paid first, the plan directing the IRS to so apply payments. The IRS objected. This court examined into the matter and found no law that required the debtor to pay trust fund taxes last and no law requiring the IRS to apply payments to trust fund taxes first. Finding the bankruptcy court order authorized by §105(a) and consistent with non-bankruptcy law, the order confirming plan was affirmed, over IRS objection.

In so doing, this court noted that "[e]ven if consistent with the Code, ... a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." Id. at 550. This is precisely the holding of the bankruptcy court below. That court read *Energy Resources* to hold that "In essence, then, 'propriety' [of a permanent non-debtor injunction] turns on whether these provisions are compatible with non-Code law." (Matter in brackets added). (App 273a). The bankruptcy court determined that non-bankruptcy law did not permit the involuntary "release" of claims, that there was no such thing as an involuntary "release," and that therefore, since the plan "deemed" those releases binding on non-accepting creditors, to that extent, the requested permanent injunction was unauthorized. (App 276a)

The Sixth Circuit disagreed with this view of *Energy Resources*, quoting therefrom the more general wording which noted that "bankruptcy courts, 'as courts of equity, have broad authority to modify creditor-debtor relationships.'" (App 11a)

Holding that § 105 authorizes a bankruptcy court to determine how a creditor must apply payments received from the debtor if benefit to the estate is found, is a far cry from holding that § 105 allows a bankruptcy court to discharge claims due by a third party to a creditor. It is to be remembered that the *Energy Resources* court did not prevent the IRS (Nevadans) from proceeding to collect its debt from the third party officers (Dow Chemical). The IRS was free to collect its debt directly from the third parties if it chose to do so.

Conclusion

For the foregoing reasons, petitioners submit that this Court should grant immediate review in this case to reverse the holding of the Sixth Circuit that a bankruptcy court has power in unusual circumstances to permanently enjoin creditors from proceeding with the collection of their claims from third parties after plan confirmation, and to reverse the holding of that court remanding the case for further findings on the grounds that the remand order calls on the bankruptcy court to exercise powers that it does not have. Petitioners also ask this Court to direct the Sixth Circuit to enter an order directing the district court to affirm the order confirming plan as explicated by the bankruptcy court.

The reasons for immediate review given above, as well as the needs of 175,000 women who have already been kept waiting in the federal system of justice for almost 10 years, render this case of such imperative public importance as to justify deviation from normal appellate practice and require immediate determination in this Court.

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